

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****August 7-8, 2006****RECOMMENDATION**

RESOLVED, That with respect to the legal services portion of the General Agreement on Trade in Services (GATS), the American Bar Association:

1. Supports the efforts of the U.S. Trade Representative to encourage the development of transparency disciplines on domestic regulation in response to Article VI (4) of the GATS requiring the development of “any necessary disciplines” to be applicable to service providers; and
2. Supports the U.S. Trade Representative’s participation in the development of additional disciplines on domestic regulation that are: (a) “necessary” within the meaning of Article VI (4) of the GATS; and (b) do not unreasonably impinge on the regulatory authority of the states’ highest courts of appellate jurisdiction over the legal profession in the United States.

REPORT

The ABA Standing Committee on Professional Discipline, established in 1973, “is responsible for developing, promoting, coordinating, and strengthening professional disciplinary and regulatory programs and procedures throughout the nation, including developing and promoting Association activities relating to professional discipline, model rules for disciplinary enforcement and standards for the imposition of sanctions.” The ongoing negotiations for international trade in legal services that are part of the larger General Agreement on Trade in Services (GATS) negotiations implicate state judicial regulation of the legal profession in the United States. The ABA Standing Committee on Professional Discipline has studied the regulatory implications of the GATS and recommends that the ABA House of Delegates adopt these policy recommendations for the reasons described in this Report.

Background Relating to the General Agreement on Trade in Services

In 1993, international trade negotiations conducted under the aegis of the General Agreement on Tariffs and Trade (GATT), commonly known as the Uruguay Round, concluded. From the Uruguay Round emerged a revised multilateral trade system based upon the 1994 signing of the Agreement Establishing the World Trade Organization.¹

The GATS is an Annex to the Agreement Establishing the World Trade Organization (WTO).² Countries that are members of the WTO, like the U. S., have agreed to be bound by the Annexes to that Agreement. The GATS is the first multilateral trade agreement that applies to services, including legal services.³ The GATS negotiations are being conducted under the auspices of the WTO.

The Office of the United States Trade Representative (USTR) conducts the GATS negotiations on behalf of the U.S. for all service sectors, including legal services. The USTR is a Cabinet level position. Since the commencement of the GATS negotiations, USTR staff members, responsible for furthering U.S. trade policies, have been assigned to conduct the legal services part of the negotiations.

The current round of GATS negotiations is called the Doha Development Agenda, or Doha Round. As required, WTO member countries are continuing to negotiate liberalized access to

¹ Sydney M. Cone, III., INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE, 2:14 (1996).

² *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1 B, General Agreement on Trade in Services*, 33 I.L.M. 1168 (1994) (hereinafter GATS).

³ See, generally, Laurel Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 Vanderbilt J. of Transnational Law 989 (2001), as revised 35 Vanderbilt J. of Transnational Law 1387 (2002).

the service markets covered by the GATS. In December 2005, the WTO held its 6th Ministerial Conference in Hong Kong where WTO members agreed to try to conclude the GATS negotiations by the end of 2006.⁴ Subsequently, WTO members have held meetings intended to move the services negotiations forward and they will continue to meet regularly in 2006.

After the conclusion of the Doha Round, the President will submit to Congress for its approval proposed trade-agreement-implementing legislation. Pursuant to the President's current Trade Promotion Authority under the Bipartisan Trade Promotion Authority Act of 2002, Congress, after holding hearings and debate, may vote "yea" or "nay" (and may not amend) with respect to any agreement resulting from the Doha negotiations and the implementing legislation. The President's Trade Promotion Authority expires on July 1, 2007.

The Office of the USTR, in fulfilling its mission to implement U.S. trade policy during the GATS negotiations, and, ultimately the WTO, has negotiated and will continue to negotiate principals and commitments that have possible serious ramifications as to how the practice of law in this country will be conducted and regulated in the future. These negotiation positions are intended, in part, to enhance the ability of U.S. lawyers and firms to secure access to existing and emerging foreign legal services markets. They will also, however, apply to access to the U.S. legal service market by inbound lawyers from other countries, and, as a consequence, to interstate multijurisdictional practice by U.S. lawyers.

The GATS Mandate Regarding Disciplines

In addition to the GATS provisions regarding access to markets, Article VI (4) provides the WTO Council on Trade in Services with the authority to establish entities to develop "any necessary disciplines" regarding certain kinds of domestic regulation measures. With regard to the development of necessary disciplines, Article VI (4) states that they are to be developed:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.... Such disciplines shall aim to ensure that such requirements are, inter alia:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.⁵

⁴ http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm

⁵ Technical standards would include rules of professional conduct. For more information about the definitions of these terms, see Laurel S. Terry, *But What Will the WTO Disciplines Apply To? Distinguishing Among Market*

Once adopted by the WTO, disciplines become enforceable obligations of WTO members. This means that for legal services, adopted WTO disciplines could apply to certain U.S. state legal education requirements, bar admissions and licensing requirements and procedures, rules of professional conduct and disciplinary enforcement rules and other regulatory measures that are now and historically have been subject to adoption and enforcement by the U.S. jurisdictions' highest courts of appellate jurisdiction.

The Current Status of Disciplines Development

To date, the WTO has adopted only one set of GATS Article VI (4) disciplines. On December 14, 1998, the Council on Trade in Services approved the Disciplines on Domestic Regulation in the Accountancy Sector (Accountancy Disciplines).⁶ The Accountancy Disciplines are scheduled to take effect at the conclusion of the Doha Round. It is unknown whether the WTO will attempt the horizontal application of the Accountancy Disciplines to all other services sectors or only to some service sectors, or whether specific disciplines will be developed in relation to some professions. The latter option seems highly unlikely this late in the negotiations.

However, at the conclusion of the December 2005 Hong Kong Ministerial Conference, WTO members reached a partial agreement that they would "...develop disciplines on domestic regulation pursuant to the mandate under Article VI (4) of the GATS before the end of the current round of negotiations."⁷ Because the Doha Round currently is scheduled to conclude by December 2006, negotiations are continuing and WTO members continue to meet regularly to discuss disciplines issues.

The Significance of Any WTO Disciplines Applicable to Legal Services

If any disciplines applicable to the legal profession are adopted, they could subject state supreme court rules relating to the regulation of the legal profession to review by the WTO dispute resolution system. For example, the concept of whether a domestic licensing requirement is "not more burdensome than necessary to ensure the quality of the service" could be subject to a WTO Dispute Resolution Panel's interpretation in the context of a case challenging a member country's rules.

Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services, 2003 Symposium The Professional Lawyer 83 (2004), available at <http://www.abanet.org/cpr/gats/articles.html>.

⁶ <http://www.abanet.org/cpr/gats/accounting.doc>. Australia has proposed specific Disciplines for the Legal Services Sector that are clearly geared to achieve specific goals of the Australian government with respect to its outbound lawyers and should not be used as a model for application to the legal services sector.

⁷ http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm

The WTO dispute resolution system is triggered by one country's complaint against another WTO member country. If countries in a dispute cannot resolve their differences through consultation with each other, a WTO Dispute Resolution Panel is appointed to determine whether a violation has occurred. The Panel issues a report with its conclusions and recommended resolution. Either country can appeal the Panel's ruling to the WTO Appellate Body. The Appellate Body's ruling must be accepted or rejected by the WTO Dispute Settlement Body.

In the event that the Dispute Settlement Body determines that a country's rule breached the obligation of the GATS, the aggrieved country could request a change in the rule or seek compensation for trade that was adversely affected by the breach. The offending country could respond in several ways. It could choose to amend the offending measure so that it complies with the GATS. Alternatively, it could choose not to amend the measure at issue and agree to pay compensation. If these remedies are not achieved, the complaining country would be entitled to impose retaliatory trade sanctions.

The WTO implementing legislation approved by Congress specifically permits the U.S. government to sue states in federal court to enforce the GATS.⁸ As a result, there exists the possibility, albeit remote, that the federal government could seek state compliance by a request to amend an offending state rule through the federal courts.

The Reason For This Resolution

The ABA is on record supporting increased access to the market for legal services throughout the world. With respect to the overall market for trade in services, legal services have and continue to be a robust part of the U.S. economy. According to U.S. Bureau of Economic Analysis statistics, in 1996 there was \$2.223 billion in U.S. legal services exports and in 2003 there were \$3.376 billion.⁹ This trend continues.

At the same time, the principle of judicial regulation of lawyers is firmly established in this country. The ABA has long asserted that regulation of the legal profession should remain the primary responsibility of the state supreme courts.¹⁰ As recently as August 2002, the House of Delegates reaffirmed that support when it adopted the recommendations of the ABA Commission on Multijurisdictional Practice. The Standing Committee on Professional Discipline believes that any disciplines ultimately developed and adopted as part of the GATS should be

⁸ 19 U.S.C.A. § 3512 (b)(2)

⁹ U.S. Bureau of Economic Analysis, Table 1—Private Services Trade by Type, 1992-2003, <http://www.bea.doc.gov/bea/di/1001serv/1004serve/tab1b.xls>.

¹⁰ Recommendations 1 and 2, Report of the ABA Commission on Evaluation of Disciplinary Enforcement, adopted February 4, 1992, ABA House of Delegates.

written so as to limit the possible intrusion on the regulatory authority of the state supreme courts.

To that end, the Standing Committee recommends that the American Bar Association:

(a) support the efforts of the U.S. Trade Representative to encourage the development of transparency disciplines on domestic regulation in response to Article VI (4) of the GATS requiring the development of “any necessary disciplines” to be applicable to service providers; and (b) support the U.S. Trade Representative’s participation in the development of additional disciplines on domestic regulation that are: (1) “necessary” within the meaning of Article VI (4) of the GATS; and (2) do not unreasonably impinge on the regulatory authority of the states’ highest courts of appellate jurisdiction over the legal profession in the United States.

The Discipline Committee’s recommendations are consistent with sentiments expressed by the Chairman of the WTO Working Party on Domestic Regulation on November 15, 2005. On that date, the Chairman issued a status report to the Special Session of the Council for Trade in Services regarding the efforts to develop disciplines. He noted that “there is a need for domestic coordination between trade ministries and regulating agencies, so that the eventual disciplines do not overly impinge on regulatory autonomy and are in keeping with the objectives of the GATS.”¹¹ This statement about regulatory autonomy is similar to language in the GATS Preamble which recognizes the rights of member countries to regulate and introduce new regulations regarding service suppliers in their territories in order to meet national policy objectives.

One of the objectives of the GATS rule based system of trade is to enhance transparency. The Committee believes that support for general concepts of transparency in the context of the development of disciplines is appropriate. Transparency enhances predictability, fairness and due process. The Discipline Committee also believes that its recommendation relating to transparency disciplines allows the Association to provide continued guidance to the USTR as specific proposals are generated and released.

In terms of the regulation of the legal profession, transparency could include public availability of the names and addresses of all authorities responsible for the admission, licensing and disciplining of lawyers and of the rules, regulations, statutes and laws relating to the admission, licensing and disciplining of lawyers (including rules of professional conduct). Further, consistent with Rule 16 of the *ABA Model Rules for Lawyer Disciplinary Enforcement* and the policies related to the ABA’s National Lawyer Regulatory Data Bank found in the *Report of the ABA Commission to Evaluate Disciplinary Enforcement* (McKay Commission Report) and Recommendation 5 of the ABA Commission on Multijurisdictional Practice, lawyers and the

¹¹ *Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services*, JOB(05)/280 (15 Nov. 2005) available at http://www.wto.int/english/thewto_e/minist_e/min05_e/job05_280_e.doc.

public should easily be able to confirm that a particular lawyer or law firm is licensed to practice law within a jurisdiction and is a member of the bar in good standing.

The Committee's recommendations are intended to express the ABA's view that, the development of any other WTO disciplines should not unreasonably impinge on the authority of the state supreme courts to regulate the legal profession in their jurisdictions. Accordingly, the USTR should be urged to resist the development of disciplines unless they are truly necessary to further the goals of the GATS and they do not unreasonably encroach on the courts' regulatory authority.

Because of the important interests relating to the regulation of the legal profession in the United States that are at stake in the GATS negotiations, it is essential that organizations that are directly involved in the regulation of the practice of law in the U.S. be provided a timely opportunity to provide their input to U.S. negotiators on these issues. Such organizations include the Conference of Chief Justices, the National Organization of Bar Counsel and the National Conference of Bar Examiners. The Standing Committee on Professional Discipline's recommendations are intended to allow the ABA and these other organizations to provide such guidance on a continuing and flexible basis. The Discipline Committee urges the House of Delegates to adopt these recommendations.

Respectfully Submitted,

Barbara K. Howe
Chair, ABA Standing Committee
on Professional Discipline
August 2006

GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Professional Discipline

Submitted By: Barbara Kerr Howe, Chair

1. Summary of Recommendation(s).

With respect to the legal services portion of the General Agreement on Trade in Services (GATS) being negotiated under the auspices of the World Trade Organization, the American Bar Association: (a) supports the efforts of the U.S. Trade Representative to encourage the development of transparency disciplines on domestic regulation in response to Article VI (4) of the GATS requiring the development of “any necessary disciplines” to be applicable to service providers; and (b) supports the U.S. Trade Representative’s participation in the development of additional disciplines on domestic regulation that are: (1) “necessary” within the meaning of Article VI (4) of the GATS; and (2) do not unreasonably impinge on the regulatory authority of the states’ highest courts of appellate jurisdiction over the legal profession in the United States.

2. Approval by Submitting Entity.

The Recommendation was approved by the Standing Committee on Professional Discipline on April 13, 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The adoption of these policies would be consistent with and enhance longstanding ABA support of primary state judicial regulation of the legal profession set forth in the following Association policies:

1) Recommendations 1 and 2 of the *Report of the ABA Commission on Evaluation of Disciplinary Enforcement* entitled *Lawyer Regulation for a New Century*, adopted by the House of Delegates on February 4, 1992;

2) The *ABA Model Rules for Lawyer Disciplinary Enforcement*, originally adopted by the House of Delegates in 1989, and amended in 1993, 1995, 1996, 1999 and 2002; and

3) Recommendation 1 of the *Report of the ABA Commission on the Multijurisdictional Practice of Law*, adopted by the House of Delegates on August 12, 2002.

Additionally, the following ABA policies are consistent with the Recommendation:

1) Recommendation 20 of the *Report of the ABA Commission on Evaluation of Disciplinary Enforcement* entitled *Lawyer Regulation for a New Century*, relating to technological enhancement of the ABA National Lawyer Regulatory Data Bank, adopted by the House of Delegates on February 4, 1992;

2) Recommendation 5 of the *Report of the ABA Commission on the Multijurisdictional Practice of Law*, adopted by the House of Delegates on August 12, 2002, urging the ABA to make available on its website selected public information from the ABA National Lawyer Regulatory Data Bank along with links to state websites containing lawyer regulatory data and contact information for lawyer disciplinary agencies; and

3) Report No. 300 of the Section of International Law and Practice, adopted by the House of Delegates February 8, 1994, urging the Congress and the United States to approve and implement the agreements resulting from the Uruguay Round of multilateral trade negotiations. This includes the GATS.

5. What urgency exists which requires action at this meeting of the House?

This round of the GATS negotiations, called the Doha Round, is currently scheduled to conclude in December 2006. The Association has not yet provided any formal input to the U.S. Trade Representative on the important matters set forth in the proposed recommendations. Adoption of these policies will allow it to do so.

6. Status of Legislation. (If applicable.)

If the Doha Round concludes with an agreement, federal legislation will be introduced to implement the agreement as and into U.S. law.

7. Cost to the Association. (Both direct and indirect costs.)

None

8. Disclosure of Interest. (If applicable.)

None

9. Referrals.

The Discipline Committee worked closely with the ABA Task Force on GATS Legal Services Negotiations from the commencement of the drafting process. Members of the Task Force represent other ABA entities including the Section of Legal Education and Admissions to the Bar. The Discipline Committee also worked with the Transnational Legal Practice Committee of the Section of International Law.

Prior to filing, the Discipline Committee submitted drafts to the Section of Legal Education and Admissions to the Bar, and to the Section of Business Law, the Litigation Section, the Section of Antitrust Law, the Section of International Law and the Center for Professional Responsibility Standing Committees. Affiliated entities such as the National Organization of Bar Counsel, Conference of Chief Justices and the National Conference of Bar Examiners were sent drafts. No comments were received by the filing deadline.

Upon filing the Report and Recommendation will be sent to all ABA Standing Committees, Sections and Divisions and to affiliated entities including the National Organization of Bar Counsel, the Conference of Chief Justices and the National Conference of Bar Examiners.

10. Contact Person. (Prior to the meeting.)
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11. Contact Person. (Who will present the report to the House.)
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